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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL DRAPEL, Defendant and Appellant.	B146530 (Super. Ct. No. LA033134)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael B. Harwin, Judge. Reversed.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin Supervising Deputy Attorney General, and Sharlene A. Honnaka, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Gabriel Drapel guilty of possessing cocaine, methamphetamine and flunitrazepam for sale. On appeal he argues he did not receive a fair trial because the prosecution failed to produce, or produce in a timely manner, exculpatory and material information to which he was entitled under Penal Code section 1054.1 and *Brady v. Maryland*.[1] He also contends the trial court unreasonably refused to allow him to produce evidence in his defense. Because we find the latter contention has merit, we reverse.

FACTS AND PROCEEDINGS BELOW

Officer Selleh (Selleh) and other law enforcement officers were watching a house at 1441 Bel Air Drive, when a woman in a black Mitsubishi drove up and parked in the driveway. Another female, Gina Craft (Craft), emerged from the residence, greeted her, and invited her inside to "see what they've done with the house." Shortly after the arrival of the black Mitsubishi defendant arrived in a truck and parked behind the Mitsubishi. According to Selleh, defendant's truck was loaded with "stuff from a home," or "furniture type items," giving Selleh the impression someone was moving into the Bel Air Drive residence. Defendant greeted the females and took one of the items from the truck into the house. Selleh then concluded his surveillance.

The following day Selleh observed a house on Venetta Drive. There he saw Craft and defendant drive off in defendant's truck, which again was loaded with household items. Police officers stopped the two in a parking lot. Selleh later arrived with a search warrant for defendant and the house on Bel Air Drive.

Selleh asked defendant where he was living and defendant replied he lived on Dorrington Street. Subsequently, however, defendant told Selleh he lived at the Bel Air Drive address.

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[1] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

Selleh advised defendant and Craft he was taking them to the Bel Air Drive residence. Selleh asked if defendant expected anyone to be at the residence. Defendant suggested people might be there making a pornographic film.

A search of Craft, defendant and defendant's truck yielded a pager and notebook belonging to defendant and several keys. The notebook contained references to "1441." Defendant possessed eight keys and Craft had one. Some of defendant's keys opened locks at the Bel Air Drive address, including the top dead bolt to the front door, but did not unlock the door knob lock. Craft's key did not unlock any of the doors to the Bel Air Drive residence.

Upon arrival at the Bel Air Drive residence, the police announced themselves and stated they had a search warrant. When no one responded they forced entry. Several officers went inside while defendant and Craft remained outside watched by an officer.

Once inside, officers used one of defendant's keys to open the master bedroom door. There, behind a night stand, the officers found a shopping bag containing plastic baggies filled with substances later shown to be methamphetamine and cocaine and two vials of drugs with defendant's name on them. One of the vials contained flunitrazepam.

The vials and baggies were not fingerprinted. Selleh explained at trial he did not order fingerprinting because he and other officers touched the items with their bare hands, thus contaminating them. Selleh stated, outside the jury's presence, that based on Craft's statement to him, he "knew" Craft's and defendant's fingerprints would be on the items.

Also found in the master bedroom were a letter addressed to defendant postmarked approximately two weeks before the search, a handwritten envelope with the name "Gabe" on it, an expired driver's license belonging to defendant with a South Alta Vista address on it, and one for another person.

In another room unlocked with defendant's key, officers found a gram scale and a VHS video cassette box. In still another locked room, to which defendant did not have a key, officers found items consistent with the making of pornographic films.

The Bel Air Drive house did not belong to defendant, but he did have a contract to refurbish it. Selleh noted no utilities were in defendant's name.

A jury found defendant guilty of possessing controlled substances for sale. Defendant filed a timely notice of appeal.

DISCUSSION

I. EVEN IF THE PEOPLE BREACHED THE DUTY TO PRODUCE INFORMATION TO THE DEFENSE, OR FAILED TO PRODUCE THE INFORMATION IN A TIMELY MANNER, DEFENDANT WAS NOT PREJUDICED.

Defendant contends he was denied a fair trial because the People withheld vital information from the defense in violation of Penal Code sections 1054[2] and 1054.1[3] or,

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[2] Penal Code section 1054: "This chapter shall be interpreted to give effect to all of the following purposes:
(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.
(b) To save the court time in trial by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.
(c) To save the court time in trial and avoid the necessity for frequent interruptions and postponements.
(d) To protect victims and witnesses from danger. . . .
(e) To provide that no discovery shall occur in criminal cases except as provided in this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.

[3] Penal Code section 1054.1 states: "The prosecuting attorney shall disclose to the defendant . . . all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
(b) Statements of all defendants.
(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

alternatively, *Brady v. Maryland*. Defendant's contention does not withstand scrutiny. To obtain reversal of a conviction for violation of the *Brady* rule or Penal Code section 1054.1[4] the defendant must show the information which was not disclosed was exculpatory and material, i.e., that had it been disclosed there is a reasonable probability the result of the proceedings would have been different.[5]

A. "Hair Club For Men" Witness

Defendant maintains he was denied due process and a fair trial because he was not informed until the weekend prior to trial the People planned to call a previously undisclosed witness. Defendant sought a continuance in order to investigate the new witness but the trial court denied the request.[6] The new witness was Valerie Brown (Brown), a Hair Club for Men employee. In their opening statement, the People said Brown would be called to testify to the reason an envelope from the Hair Club for Men was mailed to the defendant at the Bel Air Drive address. She would also bring business records documenting defendant's mailing address as 1441 Bel Air Drive.

While trial by ambush is impermissible, not all surprises compel reversal of a conviction. Rather, for a conviction to be reversed, prejudicial error must be affirmatively

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(e) Any exculpatory evidence.
(f) Relevant written and recorded statements of witnesses . . . whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case. . . .

[4] All statutory references are to the Penal Code unless otherwise stated.

[5] *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 805.

[6] Defendant requested a continuance from the original judge in this case. The case was moved to another courtroom later in the day and again defendant requested a continuance to investigate the witness. The judge who ultimately heard the case denied the request as well. Finally, defendant objected to the witness's testimony outside the presence of the jury before the witness was to testify. The court overruled this objection as well.

demonstrated to this Court.[7] Even if the trial court erred in failing to continue the trial or sanction the prosecution for failing to disclose a witness prior to trial pursuant to section 1054.1, defendant was not prejudiced because Brown never took the stand. Nor was defendant prejudiced by the People's reference in the opening statement to Brown's expected testimony. Had Brown testified in accordance with the opening statement she merely would have corroborated what the defendant already conceded—he had access to the house on Bel Air Drive. Defendant introduced a contract showing he was supposed to refurbish the Bel Air Drive house, thus acknowledging his access. He also told Officer Selleh he lived at the Bel Air Drive address. Finally, the record shows defendant knew about the Hair Club for Men envelope prior to trial. Defendant could easily have contacted Brown, but apparently chose not to do so. Therefore, we cannot conclude the trial court's rulings regarding Brown affected the outcome in this case.

B. Photo Album Testimony

Defendant next contends permitting testimony regarding a photo album containing pictures of him found in the master bedroom of the Bel Air Drive residence along with the drugs violated section 1054.1. The prosecution asked Selleh if he found "anything else in that bedroom," and then asked what he observed. Selleh replied, "I observed a photo album containing a number of pictures. I would estimate somewhere close to a hundred, depicting [defendant] with a number of other persons."

At this point in the trial defendant asked to approach the bench and at side bar complained he had not been made aware of the photo album during discovery. The prosecutor claimed he only received the information the night before. The People of course have an ongoing duty to provide information to the defendant throughout the trial as

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[7] California Constitution, article VI, section 13; *People v. Bell* (1998) 61 Cal.App.4th 282, 291.

it becomes available.[8] As a sanction for not doing so, the trial court struck the question and answer regarding the photo album, instructed the jury to disregard them and told the prosecutor to move on. Defendant contends this sanction was ineffective because the "bell was rung." Again, there was other evidence linking the defendant to the Bel Air Drive residence, such as the remodeling contract and defendant's admission to Selleh he lived at the house on Bel Air Drive. We cannot say the photo album testimony was so damaging its absence would have affected the jury's verdict.

C. The Black Mitsubishi

Defendant further argues he was denied a fair trial because the People did not turn over information regarding the woman who drove the black Mitsubishi and parked it in the driveway at the Bel Air Drive residence the day before defendant's arrest, and did not turn over the car's license plate number and registration information. On the stand, Selleh testified he ran the license plate number of the Mitsubishi and "had an idea" about who the female driver was. Defendant objected to Selleh's testimony pointing out Selleh's information had not been disclosed to him and arguing it might have led to exculpatory evidence. The court struck the prosecutor's question and Selleh's answer and instructed the jury not to consider them.

The prosecutor had a duty to turn over the information Selleh had regarding the Mitsubishi. Therefore the judge correctly excluded the previously undisclosed information Selleh "had an idea" who the driver of the Mitsubishi was. Later, defendant himself raised the issue of the woman's identity and the car's registration during cross-examination of Selleh. Thus, defendant brought into evidence what the prosecution could not. He cannot now complain he was prejudiced by information he himself brought into evidence. Furthermore, *Brady* is not implicated because defendant does not argue, and we have no

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[8] *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383.

reason to believe, the evidence regarding the driver of the Mitsubishi was exculpatory or material to defendant's guilt or punishment.

D. Untimely Delivery Of Craft's Arrest Report

Next, defendant maintains the untimely delivery of Craft's arrest report violated his right to a fair trial pursuant to section 1054.1 and the federal constitution. Section 1054.1, subdivision (d) states the prosecution must disclose during discovery the "existence of a *felony* conviction of any material witness whose credibility is likely to be critical to the outcome of the trial."[9] Defendant received Craft's arrest record, including her prior conviction, after lunch on the first day of trial.

Craft's conviction was for a misdemeanor traffic offense of driving under the influence. Therefore the arrest record was outside the scope of section 1054.1, subdivision (d). Nor could defendant rely on section 1054.1, subdivision (e) because evidence of a misdemeanor offense is not exculpatory.[10] Therefore, the People did not have a duty pursuant to section 1054.1 to turn over Craft's arrest report, and timeliness was irrelevant.

However, the constitutional duty of disclosure sweeps more broadly.[11] The United States Constitution imparts a duty on the prosecution to disclose information regarding the credibility of a material witness[12] which extends to criminal convictions, pending charges, status of being on probation, and any dishonest acts by the witness.[13] Defendant wanted to use the report to attack the credibility of a key prosecution witness, Craft. Therefore the

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[9] Section 1054.1, subdivision (d); emphasis added.

[10] *People v. Santos* (1994) 30 Cal.App.4th 169, 178.

[11] *Brady v. Maryland* requires disclosure of requested evidence that is material to defendant's guilt or punishment. *Brady, supra,* 373 U.S. at page 87. *Brady* was expanded to include witness impeachment evidence. *Giglio v. United States* (1972) 405 U.S. 150, 154.

[12] *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.

[13] *People v. Hayes, supra,* 3 Cal.App.4th at pages 1243, 1245.

prosecution did have a duty to produce the report to the extent Craft was a material witness. Nevertheless, the timeliness issue concerning the arrest record is moot because Craft did not testify.

E. Sousa Police Investigation

Defendant maintains he was denied a fair trial because he was not told Selleh was investigating Carlos Sousa (Sousa) whose name appeared on a rental agreement for the Bel Air Drive residence. The fact Selleh was investigating Sousa came out during Selleh's cross-examination. The trial court permitted defendant to voir dire Selleh outside the presence of the jury. Selleh said he was looking into Sousa "to find out anything about the rental agreement on the house" but was not investigating Sousa for being in possession of the drugs. He went on to say he found a telephone number for Sousa's brother in defendant's notebook and spoke to the brother only the day before. The brother said he believed Sousa was in prison. This was the extent of Selleh's investigation into Sousa. Defendant brought most of this information into evidence in cross-examining Selleh.

We hold failure to disclose the Sousa investigation did not deprive defendant of a fair trial. "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."[14] But, the prosecution has a duty to turn over evidence easily available to the prosecution but not obtainable by the defense.[15] Here, the rental agreement with Sousa's name on it was found in the possession of defendant at the time of his arrest. Furthermore, Sousa's driver's license was found in the Bel Air Drive house at the time of the search and defendant was aware of the license evidence prior to trial. The little information Selleh had to offer about Sousa was

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[14] *Kyles v. Whitley*, *supra*, 514 U.S. at pages 437-438.

[15] *People v. Kasim*, *supra*, 56 Cal.App.4th at page 1380, citing *People v. Coyer* (1983) 142 Cal.App.3d 839, 842.

obtainable by the defendant with minimal investigation. Therefore, *Brady* was not violated in this instance.

Furthermore, even if the prosecution had a statutory duty to provide this recently acquired information regarding Sousa, we fail to see how its untimely disclosure prejudiced defendant's case.

F. Prior Police Investigations of Defendant

Defendant contends he was denied a fair trial when the prosecution failed to turn over evidence of prior investigations into defendant's suspected drug dealing.

We have found no case addressing the question whether the prosecution has a duty to disclose reports of prior investigations of the defendant. Such reports obviously could contain information which should not be turned over to the defendant such as the names of confidential informants and attorney work product. On the other hand, the prosecution's duty to turn over exculpatory information would include exculpatory information contained in reports of prior investigations. In the present case, however, defendant has failed to show any reason to believe the reports of prior investigation into his activities contained exculpatory information.

Defendant states that preceding his arrest on the current charges the police conducted "no less than three prior searches of [his] person and residences, each resulting in insufficient evidence to sustain any charges against him." Clearly defendant was aware of the searches of his person so there was no prejudice in failing to provide information from reports of those searches. Defendant may not have been aware of some or all of the prior searches of his residences but we fail to see how evidence those searches came up empty would be exculpatory or even admissible with respect to the crimes charged in the present case. The fact defendant did not possess drugs for sale on day one or day two has no

"tendency in reason" to disprove he possessed drugs for sale on day three.[16] Furthermore, evidence defendant did not possess drugs for sale on day one or day two if offered to prove he did not possess drugs for sale on day three could be excluded under Evidence Code section 1101, subdivision (a) as impermissible evidence of specific instances of conduct offered to prove conduct on a specified occasion.

G. Craft's Fingerprints On Drug Containers

Defendant contends he did not receive a fair trial because he was not made aware until mid-trial the People's key witness, Officer Selleh, "knew" Craft's fingerprints would be on the drug containers at issue in this case. The fact fingerprints of a third party were on the drug containers was potentially exculpatory evidence and should have been disclosed to defendant during pretrial discovery. Nevertheless, defendant did receive this information at trial in time to make use of it, thus averting a section 1054.1 or *Brady* violation. Therefore, we conclude the late disclosure of this information did not prevent defendant from receiving a fair trial. Unfortunately, the trial court prevented defendant from using the information which did prevent him from receiving a fair trial as we discuss in Part II below.

H. Cumulative Prejudice

Finally, we consider whether the prosecution's failure to meet its discovery obligations in the aggregate amounted to the denial of a fair trial. Because defendant was unable to show how certain discovery violations prejudiced him we are unable to conclude they cumulatively denied him a fair trial.[17]

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[16] Evidence Code section 210 states: "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

[17] See *People v. Anderson* (2001) 25 Cal.4th 543, 606.

II. UNREASONABLY RESTRICTING DEFENDANT'S ABILITY TO CROSS-EXAMINE OFFICER SELLEH VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. The Trial Court Unreasonably Restricted Defendant's Ability To Cross-Examine Officer Selleh.

It is axiomatic a defendant has a right under the Confrontation Clause and the Due Process Clause to confront and cross-examine witnesses against him.[18] Here, defendant sought to elicit exculpatory testimony from the People's chief witness, Officer Selleh, but the trial court prevented him from doing so.

Discussions outside the presence of the jury disclosed Selleh questioned Gina Craft, who was detained with defendant at the time of his arrest. Craft told Selleh she used drugs and had used them in the Bel Air Drive residence. Moreover, she admitted to Selleh she handled the baggies and vials containing the drugs at issue in this case. Her statements showed she had access to those drugs and was able to use their contents. However, Craft also told Selleh defendant supplied the drugs to her and ran a "call and delivery" drug operation from the Bel Air Drive residence.

The People sought to call Craft as a witness but she invoked her Fifth Amendment privilege not to testify. As a result, the only way defendant could show Craft had access to the drugs as well as motive and opportunity to commit the crime involved here was to cross-examine Selleh about Craft's statements she was a drug user, had access to and handled the drugs in question.

The trial court effectively precluded defendant from cross-examining Selleh with respect to Craft's exculpatory statements by informing defendant if he introduced those statements the court would allow the prosecution to introduce Craft's inculpatory statements placing blame on defendant for furnishing her the drugs and asserting he was

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[18] *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.

storing them for sale in the Bel Air Drive residence. The court stated, "If you bring in the [exculpatory] statement, the whole statement will come in." The court erred in making this ruling.

The exculpatory statements defendant sought to introduce were admissible under the exception to the hearsay rule for declarations against penal interest.[19] The trial court, however, would have allowed the prosecution to counter this evidence with collateral inculpatory statements for which there was no hearsay exception.

In *People v. Duarte* our Supreme Court reaffirmed: "the hearsay exception should not apply to collateral assertions within declarations against penal interest."[20] The court went on to explain: "In order to 'protect defendants from statements of unreasonable men if there is to be no opportunity for cross-examination,' we have declared section 1230's exception to the hearsay rule 'inapplicable to evidence of any statement or any portion of a statement . . . not itself specifically disserving to the interests of the declarant.'"[21] The reasons for excluding hearsay statements include the jury's inability to assess the declarant's demeanor, the fact the statements are not made under oath, and there is no opportunity for the opposition to cross-examine the declarant.[22] To compensate for these deficiencies, there must be an adequate indication a hearsay statement is reliable and trustworthy. The Supreme Court and drafters of Evidence Code section 1230 reasoned declarations against penal interest are generally trustworthy because a reasonable person

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[19] Evidence Code section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability. . .that a reasonable man in his position would not have made the statement unless he believed it to be true.

[20] *People v. Duarte* (2000) 24 Cal.4th 603, 612, quoting *People v. Campa* (1984) 36 Cal.3d 870, 882.

[21] *People v. Duarte, supra,* 24 Cal.4th 603 at page 612, quoting *People v. Leach* (1975) 15 Cal.3d 419, 441, footnote omitted.

[22] *People v. Duarte, supra,* 24 Cal.App.4th at page 610; *People v. Fuentes* (1998) 61 Cal.App.4th 956, 960-961.

would not make such statements if they were not true.[23] On the other hand, hearsay statements against interest containing collateral assertions which "shift blame or curry favor" cannot be deemed reliable.[24] Therefore, Craft's statements, to the extent they were against her penal interest, were admissible and the trial court should have permitted defendant to bring them out in his cross-examination of Selleh. But the trial court should not have allowed "any statement or portion of a statement" that was not against her penal interest, such as the claim defendant was the one dealing the drugs.[25]

Thus, the trial court's erroneous decision to allow inadmissible collateral statements into evidence against the defendant if he tried to elicit admissible testimony from Selleh about Craft's declarations against interest prevented the defendant from "fully and effectively" exercising his fundamental right to cross-examine Selleh.

B. The Trial Court's Error Violated Defendant's Constitutional Right to Present A Defense And Was Not Harmless Beyond A Reasonable Doubt.

Defendant contends excluding the evidence of Craft's declarations against penal interest violated his right to a defense as guaranteed by the confrontation and compulsory process clauses of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.[26] Such a violation is reversible error unless "harmless beyond a reasonable doubt."[27] The People, relying on *People v. Watson*[28] and *People v. Hall*,[29] contend

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[23] *People v. Duarte, supra,* 24 Cal.4th at page 610.

[24] *People v. Duarte, supra,* at page 612, quoting *Williamson v. United States* (1994) 512 U.S. 594, 603.

[25] *People v. Leach* (1975) 15 Cal.3d 419, 441.

[26] *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302. See also California Constitution, (article I, section 15), (providing right to compel witnesses in criminal cases), and section 28, subdivision (d) (providing relevant evidence shall not be excluded in any criminal proceeding).

[27] *Delaware v. Van Arsdall, supra,* 475 U.S. at page 684; see *Chapman v. California* (1967) 386 U.S. 18, 24.

reversal is only warranted under the circumstances here if it is reasonably probable a result more favorable to the defendant would have been reached.[30] Moreover, they rely on *United States v. Lopez-Alvarado*, contending such evidence would not have added "substantially to the jury's knowledge gained at trial."[31]

Without question, in a criminal prosecution the defendant's constitutional right to be heard includes the right to present witnesses on the defendant's behalf. Indeed, "[f]ew rights are more fundamental."[32] It is also settled the right to present a defense includes the right to offer reliable, probative evidence tending to show a third party committed the crime charged.[33] Violation of these rights is subject to *Chapman* harmless-error analysis.[34]

In *Van Arsdall* the United States Supreme Court considered whether violations of confrontation rights under the Sixth and Fourteenth Amendments required automatic reversal. In that case the defense sought to elicit testimony regarding bias of a key witness. Specifically, defense counsel wanted to impeach the witness during cross-examination about dismissal of a pending "drunk on the highway" charge after he agreed to speak with the prosecution.[35] Outside the presence of the jury, the witness admitted the charges were dropped in exchange for his testimony. The trial court prohibited defendant from cross-examining the witness about the arrangement under which the charges against him were dropped, relying on a Delaware evidence code section which is substantially similar to our

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[28] *People v. Watson, supra*, 46 Cal.2d at page 836

[29] *People v. Hall* (1986) 41 Cal.3d 826, 834-835

[30] See *People v. Watson, supra,* 46 Cal.2d at page 836.

[31] *United States v. Lopez-Alvarado* (9th Cir. 1992) 970 F.2d 583, 587-588

[32] *Chambers v. Mississippi, supra,* 410 U.S. at page 302.

[33] *Chambers v. Mississippi, supra,* 410 U.S. at page 298; see also *Alexander v. United States* (1891) 138 U.S. 353, 356-357.

[34] *Delaware v. Van Arsdall, supra,* 475 U.S. at page 684.

[35] *Delaware v. Van Arsdall, supra,* 475 U.S. at page 684.

Evidence Code section 352.[36] The Supreme Court noted "trial courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[37] Here, however, the trial court overreached and cut off all inquiry into the witness's bias. The Supreme Court agreed the trial court's error was of constitutional proportion.[38] The Court, however, did not agree such constitutional error mandated reversal.[39] Instead, the Court relied on the *Chapman* harmless-error standard for purposes of analyzing prejudice.[40] Similarly, we apply *Chapman* to this case.

The People argue even if *Chapman* applies, the error was harmless beyond a reasonable doubt because there was "overwhelming" evidence of defendant's guilt. We disagree. According to *Van Arsdall*, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."[41]

In order to reach a guilty verdict in the present case the jury had to determine defendant constructively possessed the drugs in the house on Bel Air Drive. The People clearly presented evidence from which a reasonable juror could conclude defendant resided at the Bel Air Drive residence and used the master bedroom in which the drugs were found.

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[36] *Delaware v. Van Arsdall*, *supra*, 475 U.S. at page 676.

[37] *Delaware v. Van Arsdall*, *supra*, 475 U.S. at page 679.

[38] The case before us does not involve the exercise of discretion to exclude evidence under Evidence Code section 352, as the People contend. The People maintain that it would have been proper for the trial court to exclude Craft's evidence under section 352, citing *People v. Hall*, *supra*, 41 Cal.3d at pages 834-835. We find no merit in this claim. Craft's statements would not have been unduly prejudicial, confused the jury or consumed an undue amount of time.

[39] *Delaware v. Van Arsdall*, *supra*, 475 U.S. at page 680.

[40] *Delaware v. Van Arsdall*, *supra*, 475 U.S. at page 684.

[41] *Delaware v. Van Arsdall*, *supra*, 475 U.S. at page 684.

The People's evidence also showed Craft had no key to the house in her possession when she was detained. Officer Selleh could not remember whether any of the clothes or the duffle bag found in the residence belonged to Craft.

On the other hand, the evidence showed Craft had access to the house independent of defendant since Selleh observed she was already there when defendant arrived. Craft was also familiar with the house as shown by her invitation to the woman in the black Mitsubishi to come in and "see what they've done with the house." The fact the only key in Craft's possession when she was detained did not work any of the locks at the house does not preclude the possibility she possessed or had access to keys which did work those locks. Added to these facts, Selleh's testimony would have shown Craft used drugs, Selleh "knew" Craft's fingerprints would be found on the drug containers, there was an outstanding warrant for her arrest and she was not arrested even though Selleh knew of the warrant at the time.

Craft's exculpatory statements were not cumulative because the defense was completely prohibited from exploring that line of inquiry. In fact, the prosecution was permitted to create the impression no one but defendant had access to or motive for possessing the drugs.

A juror having heard Craft's admissible statements could have reasonably concluded Craft, not defendant, possessed the drugs or at least could have entertained a reasonable doubt about who possessed the drugs. Under the circumstances, restricting defendant's cross-examination of Selleh regarding Craft's declarations against interest was not harmless beyond a reasonable doubt and thus the appellant's conviction must be reversed.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

LILLIE, P.J.

PERLUSS, J.